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In the Supreme Court of the United States

OCTOBER TERM, 1979

ANN FLAHIFF HEADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether double jeopardy or the doctrine of collateral estoppel barred retrial of petitioner following her acquittal on a related charge.

2. Whether the trial court abused its discretion by refusing to permit petitioner to conduct a *voir dire* examination of prospective jurors.

3. Whether the district court erred in refusing to instruct the jury on one of petitioner's defense theories.

4. Whether petitioner was deprived of a fair trial as a result of comments in the prosecutor's closing argument.

5. Whether the district court abused its discretion by restricting the cross-examination of a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1980. A petition for rehearing was denied on May 29, 1980 (Pet. App. 4). The petition for a writ of certiorari was filed on July 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of falsifying time and attendance reports for a Comprehensive Employment and Training Act (CETA) program, in violation of 18 U.S.C. 1001.[1] Petitioner was sentenced to five years' imprisonment, all but six months of which was suspended in favor of five years' probation with the condition that she make restitution in the amount of $4,756.42.

The evidence showed that from August 1, 1977 to April 15, 1978, as a part of her responsibilities as secretary to Judge Charles Roberts of Nelson County, Kentucky, petitioner prepared time and attendance reports for persons employed by CETA programs in Nelson County. Although Judge Roberts served as the program's certifying officer, he delegated responsibility for the daily operation of the CETA program to petitioner and

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[1]This was petitioner's second trial on that charge. Petitioner was originally tried in February 1979 for falsifying CETA reports (Count one) and willfully misapplying and fraudulently obtaining CETA money in violation of 18 U.S.C. 665 (Count two). The first trial resulted in an acquittal on Count two and a hung jury on Count one. Petitioner was retried on Count one on May 1, 1979.

routinely signed all CETA documents she prepared (Tr. 148-152, 215-223). Petitioner mailed the report to the central office for CETA administration in Frankfort, Kentucky. CETA payroll checks were prepared from these reports and mailed back to Nelson County CETA employees (Tr. 54-56).

Rhonda Heady, petitioner's daughter, initially enrolled in the Nelson County CETA program as a part-time typist in February 1975, and was promoted to a full-time typist in July 1976. CETA time and attendance reports showed that she continued to be listed as a full-time typist until April 15, 1978; in fact, after August 1, 1977 she attended an out-of-town university as a full-time student (Tr. 96-97, 100-101, 162-165, 173).

At trial, Rhonda Heady testified that from August 1977 until April 1978 she never worked more than four hours per week and that she never signed time cards purporting to show hours she had worked (Tr. 177, 194-195). Indeed, the evidence showed that petitioner herself signed her daughter's name on the hourly time cards, prepared Rhonda Heady's time and attendance reports, and endorsed and deposited all of the payroll checks (Tr. 192, 219, 354-355). Petitioner admitted the time and attendance sheets were inaccurate but contended she was merely following Judge Roberts' orders (Tr. 353, 360).

ARGUMENT

1. Petitioner contends (Pet. 8-11) that principles of collateral estoppel and double jeopardy bar a subsequent prosecution for falsifying CETA reports after her acquittal on charges of misapplication of CETA funds. Petitioner's arguments are without merit.

The Double Jeopardy Clause prohibits successive prosecutions for the same offense. See *Illinois* v. *Vitale*, No. 78-1845 (June 19, 1980), slip op. 5. Here, petitioner was charged with two distinct offenses in the original prosecution—misapplication of CETA funds and making false statements to a federal agency. These are separate offenses, for each requires proof of at least one element that the other does not: the misapplication offense requires proof of actual misapplication, but does not require proof that any false statement was made in the course of the offense; the false statement offense requires proof that a false statement was made to a federal agency, but it does not require proof that the false statement was part of a misapplication scheme. See Pet. App. 2. Thus, under the test set forth in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the offenses were separate and could have been charged in two different prosecutions without offending the Double Jeopardy Clause. Moreover, the two charges against petitioner were originally tried together. It was only because the jury was unable to reach a verdict as to the false statement charge that it had to be retried in a separate proceeding.

Nor does the doctrine of collateral estoppel bar a retrial on the false statements charge after the jury failed to reach a verdict on that charge. The collateral estoppel doctrine provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). Here, the first jury could not have resolved the facts underlying the false statements charge favorably to

petitioner—if it had, it would have acquitted her on that charge rather than failing to reach a verdict.[2]

2. Petitioner next contends (Pet. 11-14) that the district court abused its discretion in refusing to permit her to cross-examine her employer, Judge Roberts, concerning his involvement in unrelated litigation. Petitioner argues that an inquiry into the judge's prior lawsuits would show that he was "beset on all sides by trouble" and would not therefore "trust[] anyone" (Pet. 12). This, petitioner argues, would impeach his testimony that he trusted petitioner to fill out the time and attendance reports correctly. Petitioner's argument is insubstantial.

A trial judge in the federal system has broad discretion to control the scope of cross-examination. *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976); See also Fed. R. Evid. 611(a). Rule 608(b) of the Federal Rules of Evidence permits an inquiry on cross-examination into specific instances of a witness's past conduct when probative of his character for truthfulness or untruthfulness. The trial court in petitioner's case properly refused to allow petitioner to inquire into Judge Roberts' litigation with other individuals, however, since evidence that the judge was a party to other court actions would

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[2]Collateral estoppel applies only if the first jury necessarily resolved the particular fact in issue in the defendant's favor. *United States* v. *Venable*, 585 F. 2d 71, 78 (3d Cir. 1978); *United States* v. *Ballard*, 586 F. 2d 1060, 1064-1066 (5th Cir. 1978). Petitioner's acquittal on the misapplication charge did not in any way foreclose her subsequent conviction for making false statements. An acquittal on the misapplication charge did not mean that the jury did not believe that petitioner falsified the CETA records. For example, the first jury may well have concluded that petitioner falsified the reports but that her daughter misapplied the funds. Accordingly, the government was not collaterally estopped from retrying petitioner on the falsification charge.

have had no probative bearing on the judge's credibility as a witness. The fact that the judge filed suits against other persons would not in any way impeach his testimony that he trusted petitioner to do her job correctly.[3]

3. Petitioner next contends (Pet. 14-17) that the trial court erred in refusing to instruct the jury on one of her defense theories. In brief, petitioner claimed she prepared the time and attendance reports exactly as Judge Roberts instructed her to do and that she was unaware that her actions constituted a crime (see Tr. 478-481). Accordingly, petitioner submitted proposed instructions (Pet. App. 11-14) embodying an "agency" theory of defense. In effect, petitioner's proposed instructions would have charged the jury that if they found that petitioner acted as an agent of Judge Roberts in following his instructions, they must find her innocent. The trial judge correctly refused to give the proposed instructions because they were legally unfounded (see Tr. 541).

Unlike the defense theory in the cases upon which petitioner relies,[4] petitioner's defense theory has no basis in the law. Complying with orders of an employer is no defense when the defendant has the intent to commit the crime. To the extent petitioner contended she did not have the requisite specific intent, the trial judge properly instructed the jury on this element of the offense (see Tr. 534, 536).

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[3]In fact, petitioner's proffered evidence was general character evidence, prohibited by Rule 404(a), Fed. R. Evid.

[4]*United States* v. *Garner*, 529 F. 2d 962 (6th Cir. 1976) (duress defense); *United States* v. *Lehman*, 468 F. 2d 93 (7th Cir. 1972) (instruction that income tax law does not require all of one's receipts to be deposited in a bank account); *United States* v. *Swallow*, 511 F. 2d 514 (10th Cir. 1975) (instruction that money drawn from corporate accounts was not income if it was in repayment of loans made to the corporation).

4. Petitioner also argues (Pet. 17-20) that the trial court erred in not declaring a mistrial on the ground that the prosecutor's closing argument was improper and inflammatory, and was calculated to convince the jury that a conviction was necessary to maintain their standard of life.

In closing argument to the jury, the prosecutor stated (Tr. 529-531):

> What we are doing here, ladies and gentlemen, preserves the condition and belief in government in its activities, in the honesty of our associates and the safety of our conditions and the equality of all people before the law, which the country depends on. If we can't have and rely on honest people operating our programs, what good are the programs, and it's people like this defendant who are the ruination of these programs and pervert the programs.
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> * * * you, ladies and gentlemen of the jury, you here are the government because the Congress can pass all the laws and let all the judgments and all the FBI agents and all the prosecutors in the country, but fortunately we live under the greatest system of law ever devised by man, because you are the government, and here you are making and enforcing the law. And I would ask you, ladies and gentlemen, to consider all the evidence, consider this defendant and the evidence as applied to her, and consider the instructions of the Court and return with a fair and impartial verdict for the defendant and for the United States and the citizens of this great country. I would ask you please to return with a verdict of guilty. Thank you.

Counsel's closing argument, while perhaps excessively rhetorical, certainly was not so improper as to require a mistrial. See *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 645 (1974); *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946). A prosecutor's appeal to the jury to enforce the laws to ensure the honest administration of government programs does not deprive a defendant of a fair trial. See *United States* v. *Shirley,* 435 F. 2d 1076, 1079 (7th Cir. 1970) (prosecutorial reference to increasing number of cars being stolen in a prosecution for interstate transportation of stolen motor vehicles); *United States* v. *Stead,* 422 F. 2d 183, 184 (8th Cir.), cert. denied, 397 U.S. 1080 (1970) (prosecutorial admonition to the jury to rid themselves of burglars for the good of the community); *United States* v. *Lewis,* 547 F. 2d 1030, 1036-1037 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977) (prosecutorial appeal that the jury was the public's last shield). In this case, moreover, the prosecutor's remarks show that he was emphasizing not just that the jury should convict, but rather that it assure that justice be done by fulfilling its duty to examine all the evidence and render "a fair and impartial verdict."

5. Petitioner finally claims (Pet. 21-22) that the district judge erred by conducting the *voir dire* himself and refusing to permit petitioner to question the jury.

The short answer to petitioner's argument is that Fed. R. Crim. P. 24(a) permits the court to conduct the examination of prospective jurors, so long as the court permits the parties to submit additional questions to be propounded. In this case, the trial judge followed this procedure and permitted petitioner to submit additional questions in chambers and at the bench (Tr. 5-6). Accordingly, petitioner has no cause for complaint. See

United States v. *Conroy*, 589 F. 2d 1258, 1271 (5th Cir. 1979); *United States* v. *Wertis*, 505 F. 2d 683, 684 (5th Cir. 1974), cert. denied, 422 U.S. 1045 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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